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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 785

**FRED G. ZERBST, WARDEN, UNITED STATES PENITEN-
TIARY, ATLANTA, GEORGIA, PETITIONER**

vs.

WALTER OWENS

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938**

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TRANSCRIPT OF RECORD

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 8478

FRED G. ZERBST,
WARDEN, UNITED
STATES PENITEN-
TIARY, ATLANTA,
GEORGIA, RESPON-
DENT,

Appellant,

versus

WALTER OWENS,
PETITIONER,

Appellee.

No. 1196
HABEAS CORPUS.

Appeal from the District Court of the United States
for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.

HARVEY H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.
Attorneys for Appellant,

CLINT W. HAGER, ESQ.,
621 Atlanta Nat'l Bank Bldg., Atlanta, Ga.,
Attorney for Appellee.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF
GEORGIA, ATLANTA DIVISION

Walter Owens,
Petitioner,
versus
Fred G. Zerbst, Warden,
United States Penitentiary,
Atlanta, Georgia,
Respondent,

No. 1196
HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, AS AFORESAID:

Comes Walter Owens, Petitioner, of legal age, a citizen of the United States, and within the jurisdiction of this Honorable Court, and applies for writ of habeas corpus, assigning the following reasons for his application:

That he is now being wilfully, unlawfully, arbitrarily and illegally restrained of his liberty and is incarcerated and imprisoned in the United States Penitentiary at Atlanta, Georgia, in violation of the laws and the Constitution of the United States of America, by the Honorable Fred G. Zerbst, Warden of the United

States Penitentiary, as aforesaid, all within the jurisdiction of this Honorable Court.

The reasons for the illegal, arbitrary imprisonment of the petitioner are two sentences imposed by the District Court of the United States sitting at Birmingham, Alabama, and on the illegal, unlawful, arbitrary attempt to extend the punishment directed by the Court and seeking to force the petitioner to serve two sentences contrary to direction of the Court and to force the petitioner to serve the two sentences consecutively with no provision for such service made by the Court in either sentence. See exhibits A and B to this petition, which are full, true and certified copies of the Court judgments and sentences, the same being made a part and parcel of this petition as fully as if set out herein in full.

The first sentence was imposed upon the petitioner by the District Court of the United States on the 26th day of June, 1934, for a term of fifteen months imprisonment in the custody of the Attorney General of the United States for an alleged violation of the Interstate Commerce Act, section 409, Title 18 United States Code, and has been fully served.

The petitioner was again sentenced by the same Court on a charge of violation of the Liquor Taxing Act of 1934, and section 345 Revised Statutes, to be imprisoned for a term of fifteen months and to pay a fine of \$100, on the 9th day of March, 1936, for which the petitioner was duly committed to the custody of the Attorney General of the United States and the same sentence did expire on the 10th day of March, 1937, less

regular good time deductions duly earned by the petitioner and provided for by statute, and there being no further legal sentence the petitioner should have been discharged from custody on that date.

The petitioner would show this Honorable Court that he was released from the first sentence by parole on the 27th day of April, 1935, leaving a balance of 151 days of aforesaid sentence not served, which began to run again on the 9th day of March 1936, when the petitioner was again taken into custody by the Attorney General of the United States and expired on the 7th day of August, 1936, in accordance with the judgment of the Court and the laws governing the service of Federal sentences.

The petitioner would show this Honorable Court that the two sentences were imposed by the same Court and the judgments of the Court do not direct that said sentences are to be served consecutively nor is there any provision for service of said sentences other than the provisions of the law and the general rule on concurrence in the absence of other directions in the judgments of the Court, therefore the two sentences must be construed to run concurrently, (see exhibits A and B to this petition).

The petitioner would show this Honorable Court that the Clerk of the Trial Court erred when entering in the latter commitment that the petitioner is to be held for non payment of the fine of \$100.00, assessed by the Court without any direction for such commitment and

imprisonment by the Court. (See exhibit B to this petition).

The petitioner has faithfully served all sentences imposed by the Courts of the United States and seeks relief from further illegal, unlawful, arbitrary imprisonment by writ of habeas corpus.

WHEREFORE: Petitioner prays this Honorable Court to issue a writ of Habeas Corpus, from and under the seal of this Honorable Court, directed to the Honorable Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, Georgia, the respondent to this petition, to have the petitioner before this Honorable Court, at such time and place as this Honorable Court may direct, and make an order directing the respondent to this petition to release your petitioner upon such terms and conditions as required by law, and as may be ordered by this Honorable Court, that the petitioner may have his liberty to go hence without day, as in duty bound he will ever pray, Etc.

WALTER OWENS, *Petitioner.*

AFFIDAVIT

COUNTY OF FULTON,)

) ss

STATE OF GEORGIA.)

Personally appeared before me, a notary public, Walter Owens, who being by me first duly sworn, on his oath says that he is the identical Walter Owens, who signed the foregoing petition, and that the matters and things set out therein and each of them are true

and correct to the best of his knowledge and belief, and that he believes that he is entitled to the redress he seeks therein, and that this petition expires that full and complete justice may be done in the premises.

WALTER OWENS, *Affiant.*

Sworn to and subscribed before me this 14th day of April, 1937.

M. E. ALEXANDER,

Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

WHEREFORE: Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

WALTER OWENS, *Affiant.*

Sworn to and subscribed before me this 14th day of April, 1937.

M. E. ALEXANDER,

Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

**ORDER GRANTING WRIT IN FORMA
PAUPERIS**

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta, Georgia, at 10 o'clock a. m., on the 17th day of April, 1937.

This the 16th day of April, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

EXHIBIT "A"—COURT RECORD

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

MONDAY, JUNE 25TH, 1934

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment: Present, Honorable W. I. Grubb, United States District Judge, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Thos. J. Kennamer, United States Marshal, and W. S. Lovell, Clerk.

8634 UNITED STATES

versus

**WALTER OWENS, alias
BIG CHIEF**

This cause coming on to be heard, this day, comes the United States by District Attorney, comes also the de-

fendant in his own proper person and by counsel, and being arraigned in open court upon the Indictment filed herein against him, charging an alleged violation of Section 409 Title 18 United States Code—theft from interstate shipment of freight, pleads not guilty thereto and, for defense, throws himself upon this country as does also the United States Attorney.

To try this cause comes a jury of good and lawful men, to wit, A. J. Phillips and eleven others duly impaneled, charged and sworn and the trial of this cause is begun.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the court that this cause be and is hereby continued until tomorrow morning.

TUESDAY, JUNE 26TH, 1934

This being the day and hour to which this cause was on yesterday continued, come again the parties hereto, the United States by District Attorney, comes also the defendant in his own proper person and by counsel, comes also the jury heretofore selected, impaneled, charged and sworn and the trial of this cause is resumed.

After the introduction of the evidence, the argument of counsel, the oral charge delivered by the court, the jury returned in open court the following verdict, which was read by the clerk in the presence of the defendant, to-wit: "We the jury find the defendant,

Walter Owens, guilty as charged in count 6 of the Indictment. A. J. Phillips, Foreman.

Thereupon the defendant being inquired of and showing no good or sufficient cause why sentence should not now be pronounced upon him;

It is ordered, adjudged and decreed by the court that said defendant be and he is hereby sentenced to be committed to the custody of the Attorney General of the United States for imprisonment in a penitentiary for and during a period of fifteen months.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
)
) ss:
NORTHERN DISTRICT OF ALABAMA)

I, Chas. B. Crow, Clerk of the United States District Court in and for the Northern District of Alabama, do hereby certify that the annexed and foregoing is a true and full copy of the original Court Record showing conviction and sentence in the matter of United States of America vs. Walter Owens, Alias Big Chief, Number 8634, Southern Division, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Birmingham, Ala. this 29th day of March, A. D. 1937.

CHAS. B. CROW,
Clerk.

(SEAL)

EXHIBIT "B"—COURT RECORD

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DIVISION
OF THE NORTHERN DISTRICT OF ALABAMA

MONDAY, MARCH 9TH, 1936

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment: Present, Honorable David J. Davis, United States District Judge, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States Attorney; Alex Smith, United States Marshal, and W. S. Lovell, Clerk.

9206 UNITED STATES OF AMERICA
vs
WALTER OWENS

This cause coming on to be heard, this day, comes the United States of America by District Attorney, comes also the defendant in his own proper person, and being arraigned in open court upon the Indictment filed herein against him, charging an alleged violation of Liquor Taxing Act of 1934, and Section 3450 Revised Statutes, transporting distilled spirits without the immediate containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits, and evidencing the payment of all Internal Revenue taxes imposed by law, removing, depositing and concealing distilled spirits on which a tax was imposed with the in-

tent to defraud the United States of such tax,—pleads guilty thereto as charged.

Thereupon the defendant being inquired of and showing no good or sufficient cause why sentence should not be pronounced upon him.

It is ordered, adjudged and decreed by the Court that said defendant, Walter Owens, be and he is hereby sentenced to be committed to the custody of the Attorney General of the United States for imprisonment in a penitentiary for and during a period of fifteen months, and pay a fine of One Hundred Dollars (\$100.00).

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)

)

) ss:

NORTHERN DISTRICT OF ALABAMA)

)

I, Chas. B. Crow, Clerk of the United States District Court in and for the Northern District of Alabama, do hereby certify that the annexed and foregoing is a true and full copy of the original Court Record showing plea of guilty and sentence in the matter of United States of America vs. Walter Owens, Number 9206, Southern Division, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the

aforesaid Court at Birmingham, Ala. this 29th day
of March, A. D. 1937.

(SEAL)

CHAS. B. CROW,
Clerk.

Filed in Clerk's Office United
States District Court, North-
ern District of Georgia, April
16th, 1937.

J. D. STEWARD, *Clerk,*

By W. L. NEESE, *Deputy Clerk.*

(TITLE OMITTED).

ANSWER

Now comes the respondent in the above-entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the Northern District of Alabama. Respondent further says that the facts are, as follows:

Respondent holds in his possession two warrants of commitment directing the incarceration of petitioner. The first sentence was rendered by the U. S. District

Court for the Northern District of Alabama, and ordered the imprisonment of petitioner for a term of fifteen months. On April 27, 1935, petitioner was released on Parole. On March 20, 1936, petitioner was returned to the institution with a new sentence imposed by the same court, and directing incarceration for fifteen months. On April 23, 1936, the predecessor in office of your respondent received a letter dated April 20, 1936, signed by Ray L. Huff, Parole Executive, enclosing a parole warrant for petitioner for violation of the parole granted under his first sentence. Said letter further directs that the said warrant be placed as a detainer, and that petitioner be taken into custody on the warrant at the expiration of the second sentence of one year and one day which he was then serving. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with in petitioner's case.

On March 10, 1937, the second sentence of two years expired, and petitioner was then taken into custody to serve the remainder of his first sentence, which amounted to 151 days if his parole be revoked.

Respondent does not, of course, maintain that there are any directions in either sentence as to sequence of service; indeed, it would be impossible for the first sentence to provide for service after the second sentence which was passed nearly two years later.

Respondent attaches hereto and makes a part of this response photostatic copies of mittimus of the U. S. District Court for the Northern District of Alabama,

of parole warrant signed by Arthur D. Wood, Chairman of the U. S. Board of Parole, of the return thereof, and of letter dated April 20, 1936, signed by Ray L. Huff, Parole Executive, addressed to Mr. A. C. Aderhold, Warden, U. S. Penitentiary, Atlanta, Ga., said exhibits being marked "A", "B", "C", and "D" respectively. Respondent also attaches hereto and makes a part of this response copy of conduct record sheet for the convenience of the court, which tabulates the computation of petitioner's terms of imprisonment, same being marked "D".

Wherefore, having fully answered, respondent prays the judgment of the court.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent.

EXHIBIT "A"—COMMITMENT

IN THE DISTRICT COURT OF THE
UNITED STATES OF AMERICA
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

The President of the United States of America—

To the Marshal of the United States for the Northern
District of Alabama and to the Warden of the
United States Penitentiary at Atlanta, Georgia,
GREETING:

Whereas, at the March term of said Court, 1936,
held at Birmingham, Ala. in said district and division,
to wit, on March 9th, 1936, WALTER OWENS was
sentenced by said Court, upon his plea of guilty to be
committed to the custody of the Attorney General of
the United States or his authorized representative, for
imprisonment in a (Penitentiary) for and during the
term and period of fifteen (15) months beginning on
the date on which he is received at the (Penitentiary)
for service of said sentence; or if said prisoner shall be
committed to a jail or other place of detention to await
transportation to the place at which his sentence is to
be served, said sentence shall begin on the date on
which he is received at such jail or other place of deten-
tion; and to pay a fine to the United States in the sum
of \$100.00 not to stand committed until such fine shall
be paid, or until he shall be otherwise discharged by due
course of law, for violation of LIQUOR TAXING
ACT OF 1934 (Sec. 267 Title 26 USCA) AND SEC.

3450 R. S. Did transport distilled spirits without the immediate containers thereof having affixed thereto a stamp denoting the quantity of such distilled spirits, and evidencing the payment of all Internal Revenue taxes imposed by laws; conceal, remove and deposit distilled spirits on which a tax was imposed with the intent to defraud the United States of such tax.

And Whereas, the Attorney General of the United States has designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said WALTER OWENS shall be served.

Now, this is to command you, the said Marshal, forthwith to take the said WALTER OWENS and him safely transport to said United States Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said WALTER OWENS and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable David J. Davis Judge of said Court, and the seal thereof, affixed at Birmingham, Alabama, in said district, this 10th day of March, 1936.

W. S. LOVELL, *Clerk.*

JAMES L. PUGH, *Deputy Clerk.*

A TRUE COPY:

W. S. LOVELL, CLERK
U. S. DISTRICT COURT
NORTHERN DISTRICT OF ALA.

By JAMES L. PUGH
DEPUTY CLERK

RETURN

I have executed the within writ in the manner following, to wit: On March 9, 1936 I delivered said WALTER OWENS to the Warden of the Jefferson County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on MAR. 20, 1936, I delivered said WALTER OWENS to the Warden of U. S. Penitentiary at Atlanta, Georgia, together with a copy of this commitment.

ALEX SMITH
United States Marshal.

By B. W. GUNTER
Deputy.

I hereby certify that the within named Federal Prisoner was committed to the Jefferson County Jail, Birmingham, Alabama, and began serving sentence in this case on this the 9th day of March, 1936.

ALEX SMITH,
United States Marshal.

EXHIBIT "B"

**DEPARTMENT OF JUSTICE
WASHINGTON, D. C.**

WARRANT

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal Process Within the United States:

WHEREAS, Walter Owens, 344611-A was sentenced by the United States District Court for the Northern District of Alabama to Serve a sentence of —— years 15 months, and —— days for the crime of violating the Interstate Commerce Act and was on the 27th day of April, 1935, released on parole from the U. S. Penitentiary, Atlanta, Georgia..

AND, WHEREAS, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is declared to be a fugitive from justice;

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Walter Owens, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 24th day of September, 1935.

When apprehended communicate

with Director, Bureau of Prisons
for instructions.

ARTHUR D. WOOD
Chairman Member, U. S. Board of Parole.

(SEAL)

U. S. Penitentiary,
Atlanta, Ga.
March 11, 1937.

The within named Walter Owens completed a fifteen-months sentence on March 10, 1937, which sentence was imposed March 9, 1936, and was retained in custody as a parole violator under sentence of fifteen months imposed June 28, 1934,—the unserved portion of said sentence being 151 days.

FRED G. ZERBST, *Warden.*

EXHIBIT "C"—LETTER, HUFF, PAROLE

EXECUTIVE, APRIL 20, 1936.

**DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON**

April 20, 1936.

M. A. C. Aderhold,
Warden,
U. S. Penitentiary,
Atlanta, Georgia.

In re: Walter Owens,
old No. 44611-A
new No. 47980-A (ZW)

Dear Sir:

Enclosed herewith is parole violator warrant, in duplicate, and copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Owens into custody on the warrant at the expiration of his present sentence. The case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant.

When you have executed the warrant please return the original to this office stating specifically that you

are holding Owens as a parole violator and on the original commitment.

Very truly yours,

RAY L. HUFF
Parole Executive.

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA.

EXHIBIT "D"—CONDUCT RECORD

Record of Walter Owens Color Black No 47980 alias "Big Chief"; Walter Lewis Crime Vio. Internal Revenue Laws (Transporting & Concealing Liquor). Sentence 15 months. Fine \$100.00 Cost None Not Committed Received Mar. 20, 1936 Where convicted N-Ala-Birmingham Sentenced Mar. 9, 1936 Occupation Barber Age 45 Sentence commences Mar. 9, 1936 Full term expires June 8, 1937 Good time allowance 90 days. Short term expires Mar. 10, 1937. Residence, Birmingham, Ala. Action of Parole Board 9-16-36 did not file. Eligible for parole Aug. 8, 1936 WANTED to be held at expiration of sentence under Reg. No. 47980 for service of remainder of sentence as parole violator under No. 44611-A, and listed for hearing at next Board following expiration of instant sentence, at which time parole violator warrant is to be executed—see letter 4-20-36.

6-26-34—sentenced to 15 months. 6-29-34—Received as No. 44611. 4-27-35—Paroled; 9-24-35 declared parole violator. 3-10-37—Sentence expired as No. 47980.

3-11-37—in custody to serve remainder of 1st sentence as register No. 44611, has 151 days to serve, if parole be revoked.

Filed April 26, 1937.

(TITLE OMITTED).

**ORDER SUSTAINING WRIT AND
DISCHARGING PETITIONER**

The above case came on for hearing and was duly heard and considered.

This case involved the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192, Habeas Corpus, this day decided, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell v. Zerbst*, and upon authority of same:

It is considered, ordered and adjudged that the writ of habeas corpus be and hereby is sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This May 13th, 1937.

**E. MARVIN UNDERWOOD,
United States District Judge.**

Filed May 13th, 1937.

(TITLE OMITTED).

PETITION FOR APPEAL

**TO THE HONORABLE E. MARVIN UNDER-
WOOD, JUDGE OF SAID COURT:**

The above named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 13th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

Filed May 14th, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of \$100.00, without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed May 14, 1937.

(TITLE OMITTED).

ASSIGNMENT OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 13th day of May, 1937, is erroneous:

- (1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.
- (2). Because the court erred in not ruling that the Parole Board's action was independent of the trial

court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the parole sentence or first sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the answer of

the respondent, the Court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

Wherefore the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
United States Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14, 1937.

(TITLE OMITTED).

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding, the case was tried upon the basis of the pleadings, consisting of the application for habeas corpus with exhibits annexed and the return of the respondent with exhibits attached, together with the testimony of Ben F. Bates, who testified that he is Record Clerk of the Atlanta Federal Penitentiary, and otherwise testified to the beginning and expiration dates of petitioner's sentences substantially as they are set out

in the return, and further that the writ of habeas corpus is not premature, but that if the terms be computed as running concurrently, or, as petitioner alleges in his petition they should be, then petitioner would have been eligible for release from custody on March 10, 1937. Said pleadings and exhibits and said testimony of Ben F. Bates are hereby settled as the evidence in the cause.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED).

PRAECIPE

**TO THE CLERK OF THE ABOVE-ENTITLED
COURT:**

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.
2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of court of May 13, 1937.
4. Petition for appeal and order of court allowing same.
5. Judge's certificate as to the evidence.
6. The assignments of errors.
7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney
Counsel for Respondent

Filed May 14, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Geor-

gia, do hereby certify that the foregoing and attached 23 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED
STATES PENITENTIARY, ATLANTA,
GEORGIA, RESPONDENT, *Appellant*,
versus
WALTER OWENS, PETITIONER, *Appellee*,

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 28th day of May, A. D. 1937.

(SEAL)

J. D. STEWARD,

*Clerk, United States District Court,
Northern District of Georgia.*

By

C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6th, 1937

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

WALTER OWENS

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the Court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern
District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: The eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had

expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b) prisoners granted a reduction of sentence for good

conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. *White vs. Kwiatkowski*, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. *Aderhold vs. McCarthy*, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon *Anderson vs. Corall*, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717) upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various

boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In *Anderson vs. Corall*, *supra*, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In *Hill vs. Wampler*, 298 U. S. 460-465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * The prisoner is detained not by virtue of the warrant of commitment, but on account of the judgment and

sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner

in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified; and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA,
GEORGIA

v.

WALTER OWENS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 29 to 41 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8478, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Walter Owens is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 28 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,

*Clerk of the United States Circuit Court
of Appeals, Fifth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.